TABLE OF CONTENTS OF BRIEF.

	Page
I. Opinions in the Courts Below	2
II. Statement of the Grounds on Which the Jurisdiction Is Invoked	2
III. The Question Presented for Review	2
IV. The Statute Involved in the Case	3
V. Statement of the Case	4
VI. Reasons Relied on for Allowance of Writ	7
VII. Argument	9
Opinion of U. S. District Court, Sur Pleadings and Proof, Civil Action No. 15589 (Filed February 15, 1955)	15
Opinion of the Court (U. S. C. A. — 3, Nos. 11639, 11640, 11641) (Filed December 22, 1955)	24

TABLE OF CASES CITED.

Page

Arrow Distilleries, Inc. v. Globe Brewing Co., 117 F. 2d 347 (C. A. 4th, 1941) 7, 12

California Fruit Growers Exch. v. Sunkist Baking Co., 166 F. 2d 971 (C. A. 7th, 1947) 7, 12, 13

Hyde Park Clothes, Inc. v. Hyde Park Fashions, Inc., 204 F. 2d 223 (C. A. 2d, 1953) 7, 11

Sunbeam Furniture Corporation v. Sunbeam Corporation, 191 F. 2d 141 (C. A. 9th, 1951) 7, 12

Sunbeam Lighting Co. v. Sunbeam Corporation, 183 F. 2d 969 (C. A. 9th, 1950) 7, 12

TABLE OF STATUTES AND AUTHORITIES CITED.

Page

Act of June 25, 1948, c. 646; 62 Stat. 928; 28 U. S. C. 1254 2

Lanham Act (July 5, 1946 c. 540; 60 Stat. 427; 15 U. S. C. A., Sec. 1051) 3, 4, 13

IN THE

Supreme Court of the United States

Term,

No. .

NATIONAL DRYER MANUFACTURING CORPORATION, NATIONAL DRYER SALES CORPORATION, AND JACK ACKOFF, INDIVIDUALLY AND TRADING AS JACK ACKOFF COMPANY,

Petitioners,

v.

THE NATIONAL DRYING MACHINERY COMPANY,

Respondent.

PETITION OF NATIONAL DRYER MANUFACTURING CORPORATION, NATIONAL DRYER SALES CORPORATION, AND JACK ACKOFF, INDIVIDUALLY AND TRADING AS JACK ACKOFF COMPANY, FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of National Dryer Manufacturing Corporation, National Dryer Sales Corporation, and Jack Ackoff, individually and trading as Jack Ackoff Company, for a writ of certiorari to review two judgments of the United States Court of Appeals for the Third Circuit entered December 22, 1955, respectfully represents:

I. Opinions in the Courts Below.

The District Court of the United States for the Eastern District of Pennsylvania entered two decrees, both dated April 27, 1955, in two Civil Actions which were tried together. Chief Judge William H. Kirkpatrick wrote an opinion which was filed in one of the actions and which disposed of the issues in the other action. This opinion, entered February 15, 1955, is appended, and is reported at 129 F. Supp. 389. The Requests for Findings of Fact and Conclusions of Law of the parties, which are referred to in the opinion, appear at pages 82a, et seq., of the consolidated joint appendix.

The Court of Appeals for the Third Circuit filed a per curiam opinion on December 22, 1955 affirming the decrees of the trial court. This opinion, which is unreported, is appended.

II. Statement of the Grounds on Which the Jurisdiction Is Invoked.

A. The Court of Appeals for the Third Circuit entered two judgments on December 22, 1955, affirming the two decrees of the United States District Court for the Eastern District of Pennsylvania.

B. There were no orders respecting a rehearing or granting an extension of time within which to petition for certiorari.

C. The statutory provision believed to confer on this Court jurisdiction to review the judgment by writ of certiorari is Act of June 25, 1948, c. 646; 62 Stat. 928; 28 U. S. C. 1254.

III. The Question Presented for Review.

May the respondent, The National Drying Machinery Company, which uses the word "National" as a registered trade-mark in connection with the sale of industrial drying

machinery, prevent the use of that word as a part of the names of the corporate petitioners and as a part of the trade-mark used by them solely in connection with the sale of an electric hot air hand dryer for use in washrooms, where there is no competition between the parties, where there are substantial differences between the products, customers, advertising methods and distribution systems of the parties, and where the customers of the parties are sophisticated and will exercise a high degree of care before buying the products of either?

IV. The Statute Involved in the Case.

The respondent has a trade-mark which was registered originally under the Act of 1905 and again under the Act of July 5, 1946, c. 540; 60 Stat. 427; 15 U. S. C. 1051. Respondent sought relief under the remedial provision of the 1946 Act which reads as follows:

> "Any person who shall, in commerce, (a) use, without the consent of the registrant, any reproduction, counterfeit, copy, or colorable imitation of any registered mark in connection with the sale, offering for sale, or advertising of any goods or services on or in connection with which such use is likely to cause confusion or mistake or to deceive purchasers as to the source of origin of such goods or services; or (b) reproduce, counterfeit, copy, or colorably imitate any such mark and apply such reproduction, counterfeit, copy, or colorable imitation to labels, signs, prints, packages, wrappers, receptacles, or advertisements intended to be used upon or in connection with the sale in commerce of such goods or services, shall be liable to a civil action by the registrant for any or all of the remedies hereinafter provided in this chapter, except that under sub-section (b) of this section the registrant shall not be entitled to recover profits or damages unless the acts have been committed with knowl-

edge that such mark is intended to be used to cause confusion or mistake or to deceive purchasers." 15 U. S. C. § 1114 (1).

V. Statement of the Case.

The Respondent brought an action against Jack Ackoff, individually and trading as Jack Ackoff Company, one of the Petitioners, in the United States District Court for the Eastern District of Pennsylvania, charging Ackoff with infringement of the Respondent's common law and statutory trade-mark rights and with unfair competition. Jurisdiction was based upon the trade-mark laws of the United States, 15 U. S. C., Sections 1051-1127.

National Dryer Manufacturing Corporation and National Dryer Sales Corporation, for whom Ackoff acted as an exclusive distributor, subsequently brought an action in the U. S. District Court for the Eastern District of Pennsylvania seeking an injunction against the Respondent's announced intention to use the word "National" in connection with the sale of an electric hand dryer, and for a declaration that the use of the word "National" by these two petitioners did not infringe any rights of the Respondent and did not constitute unfair competition. Those two corporations are organized under the laws of the State of Illinois, and the Respondent is organized under the laws of Pennsylvania. Jurisdiction in this action was based upon diversity of citizenship.

The action by the Respondent against Ackoff and the action by the other two Petitioners against the Respondent were tried together before Chief Judge William H. Kirkpatrick, sitting without a jury, who filed an Opinion on February 15, 1955 in which he concluded that the Petitioners infringed the common law and statutory trade-mark rights of the Respondent. Decrees were entered on April 27, 1955 in both actions enjoining the Petitioners from using the word "National" in connection with the sale of

the hand dryer. The decree against the two corporate Petitioners included an order for an accounting for profits which was subsequently deleted by an order filed May 10, 1955. The Petitioners appealed from the two decrees to the U. S. Court of Appeals for the Third Circuit. The Respondent appealed from the action of the trial court in eliminating the order for an accounting for profits. The three appeals were dismissed by the U. S. Court of Appeals for the Third Circuit in a per curiam opinion filed December 22, 1955. Your Petitioners pray this Honorable Court to issue a writ of certiorari to the U. S. Court of Appeals for the Third Circuit to review the judgment of that Court dismissing the two appeals of the Petitioners.

The Respondent was organized under the laws of Pennsylvania in October of 1951 to conduct a business which had been originated in 1923 by a New Jersey corporation bearing the same name. The New Jersey corporation had gone out of existence in 1937, and from 1937 until 1951 the business was conducted under the same name but first as a partnership and then as a sole proprietorship.

The Respondent and its predecessors have been engaged in the business of manufacturing and selling custom type drying machinery. By and large, it takes standard components such as fans, doors, panels, structures, and the like and adapts or groups them to suit the needs of its customers. The average sale price of its dryers is between $5,000 and $20,000. The average size of its dryers is 10 feet by 10 feet by 20 feet or 30 feet. Fifty to sixty percent of the gross business of the Machinery Company is in the manufacture and sale of drying machinery to the textile industry. Another thirty percent is in drying machinery used in the pharmaceutical and chemical industries. The balance of its business is in miscellaneous drying machinery, some of which is used in the synthetic and plastics industries.

The Respondent has never manufactured and sold an electric hand dryer, nor has it ever manufactured and sold

a hair dryer of the type used in beauty parlors. It has sold a few clothes dryers for household use but not in any quantity, and obviously without any idea of making this type of dryer a regular part of its business.

On March 18, 1930 the Respondent's predecessor was granted a trade-mark registration consisting of the word "NATIONAL" in capital letters, printed in an irregular line across an outline map of the United States. The mark was again registered in 1952 under the 1946 Trade-Mark Act. The registration disclaims the map of the United States although the map is actually used with the word "National" as a trade-mark. The Respondent has used this mark since September of 1929.

The Petitioners have manufactured and sold a small standardized electric dryer, which is affixed to the walls of a washroom, for drying the hands, hair and face by means of hot air. The hand dryers are produced in large quantities, and the suggested retail price is $142.50. This hand dryer was conceived by a George S. Clemens who in May of 1948 organized the National Dryer Corporation for the purpose of manufacturing and selling the hand dryer. In the spring of 1950 the National Dryer Sales Corporation, one of the Petitioners, was organized by strangers to Clemens to sell this hand dryer, and in April of 1952 the National Dryer Manufacturing Corporation, another of the Petitioners, was organized by the owners of the Sales Corporation to purchase all of the assets of the National Dryer Corporation and to continue the manufacture of the hand dryer. Ackoff, the remaining Petitioner, became an exclusive distributor for the hand dryer in the summer of 1953, which relationship was terminated by mutual agreement in February of 1954. The word "National" has been used as a part of the names of the corporate Petitioners or their predecessor since 1948. They have used the trademark "The National Dryer" and more recently "The National Hand Dryer" in connection with the sale of the electric hand dryer. This use of the word "National" was

begun without any knowledge of the existence of the Respondent, its business name and trade-mark. Approximately seventy percent of the hand dryers are sold for installation in schools, public buildings and restaurants and to transportation companies. The balance are sold to hospitals, amusement parks, industries, utilities, service stations, hotels, and the like.

The parties do not advertise in the same periodicals, and they use different channels of distribution.

VI. Reasons Relied on for Allowance of Writ.

A. In holding that Respondent is entitled to protection of its weak and non-fanciful trade-mark "National" as to goods with respect to which the Respondent has never used the trade-mark, the decision of the Court below is in conflict with decisions in other circuits.

In *Hyde Park Clothes, Inc. v. Hyde Park Fashions, Inc.*, 204 F. 2d 223 (C. A. 2d, 1953) the Court of Appeals for the Second Circuit permitted the use of the trade-mark "Hyde Park" by the junior user on women's clothing despite the fact that the senior user used the mark on men's clothing.

In *Arrow Distilleries, Inc. v. Globe Brewing Co.*, 117 F. 2d 347 (C. A. 4th, 1941), the Court of Appeals for the Fourth Circuit permitted the junior user to use the trade-mark "Arrow" on cordials and liqueurs while the senior user was using the mark on beer.

In *California Fruit Growers Exch. v. Sunkist Baking Co.*, 166 F. 2d 971 (C. A. 7th, 1947), the Court of Appeals for the Seventh Circuit, in an opinion by Mr. Justice Minton, permitted the junior user to use the trade-mark "Sunkist" on baking products while the senior user used the same trade-mark on citrus fruits, and on canned and dried fruits and vegetables.

In *Sunbeam Lighting Co. v. Sunbeam Corporation*, 183 F. 2d 969 (C. A. 9th, 1950) the Court of Appeals for the

Ninth Circuit permitted the junior user to use the word "Sunbeam" as part of its corporate name which was affixed to fluorescent lighting fixtures manufactured and sold by it despite the fact that the senior user used the word as part of its corporate name and also as a trade-mark in connection with household electric appliances and utensils. The Court of Appeals for the Ninth Circuit has also permitted the use of the word "Sunbeam" as a part of a corporate name by a furniture manufacturer, *Sunbeam Furniture Corporation v. Sunbeam Corporation,* 191 F. 2d 141 (C. A. 9th, 1951).

B. In permitting the Respondent to prevent the use of his weak trade-mark "National" on goods with respect to which it has never used the trade-mark, the Court of Appeals has decided an important question of federal law under the Trade-Mark Act of 1946 which has not been, but should be, settled by this Court.

VII. Argument.

The courts below have permitted the Respondent to prevent the use of the word "National" with respect to goods which it has not heretofore manufactured and sold. The extension of such protection to a weak trade-mark of this character is contrary to the decisions in the other circuits.

The Respondent uses the word "National" as a part of its corporate name and as a trade-mark in connection with the sale of certain types of drying machinery. Fifty to sixty percent of the gross business of the Respondent is in the manufacture and sale of drying machinery for the textile industry. Another thirty percent is for the chemical and pharmaceutical business. The balance of its business is in miscellaneous drying machinery, some of which is used in the synthetic and plastic industries. The Respondent is in the business of manufacturing and selling custom type drying machinery. By and large, it takes standard components such as fans, doors, panels, structures, and the like, and adapts or groups them to suit the needs of its customers for a particular type of drying machinery. On the average, its dryers are mammoth in size in comparison with the hand dryer, and the average sale price is between $5,000 and $20,000. It advertises in periodicals designed to reach the customers in the textile, chemical and pharmaceutical fields.

The Petitioners use[1] the word "National" as part of their corporate names and as part of the trade-mark "The National Dryer" and more recently "The National Hand Dryer" in connection with the sale of a small standardized electric hot air dryer which is affixed to washroom walls and is used for the drying of hands, face and hair. Seventy percent of the sales of the Petitioners are for installation in washrooms of schools, public buildings, restaurants and

(1) With the exception of Ackoff, who no longer distributes the hand dryer and who, therefore, makes no present use of the word "National".

transportation companies. The balance of their business is for installations in washrooms of hospitals, amusement parks, industries, utilities, service stations, hotels, and the like.

The Respondent's products are custom type, large in size, with a substantial sale price. The Petitioners' product is a small standardized item with a suggested retail price of $142.50. It is obvious that different merchandising problems are involved in the distribution of these products. The Respondent sells to customers who have an obvious need for a drying machine in connection with their productive facilities. Its sales are accomplished by means of two distributors who divide the Eastern part of the United States between them and by salesmen who operate out of the Philadelphia office.

Anyone with a washroom is a potential customer for the hand dryer, but the primary merchandising problem in connection with the sale of the hand dryer is to convince the prospective customer of the superiority of the hand dryer over cloth and paper towels. The hand dryer is distributed by means of twelve distributors and approximately twelve to fifteen dealers together with about twenty to twenty-five sub-dealers who operate under the distributors. None of the distributors of the hand dryer handle products which are in any way similar to the drying machinery manufactured and sold by the Respondent. It should be noted that the Respondent does not manufacture and sell any dryer which is merchandised in the same fashion as a hand dryer. On the one hand, the Respondent adapts its products to fit the obvious needs of its potential customers for a drying machine; and on the other hand, the Petitioners produce a standard item which must be sold as such by convincing the potential customer of the need for the hand dryer and its superiority over cloth and paper towels.

It is obvious that the customers of both parties will be for the most part careful and discerning. This is not a

situation in which the products are purchased over the counter in a casual fashion by the general public.

The word "National" is about as weak a trade-mark as there can be. This was found as a fact by the trial court, and there was ample evidence to show the frequent use of the word both as a trade name and as a trade-mark. As stated at the outset, the decisions in this case extend the protection afforded to such a weak trade-mark beyond that afforded to such marks in the other circuits and, in fact, to an extent denied in those other circuits.

In *Hyde Park Clothes, Inc. v. Hyde Park Fashions, Inc.*, 204 F. 2d 223 (C. A. 2d, 1953), the plaintiff used the trade-mark "Hyde Park" in connection with the manufacture and sale of men's clothing, particularly suits. In 1945 the defendant began the use of the same mark on women's clothing. The Court of Appeals for the Second Circuit pointed out that the interests of the owner of a trade-mark who seeks to extend it to cover goods on which he has never used it are two: the possibility that the trade practices of the defendant may stain the reputation of the plaintiff; and the possibility that the plaintiff may wish to extend his business into the market which the defendant has already begun to exploit. These interests are to be weighed against the interests of the defendant in preserving whatever goodwill he has acquired under the name and marks he has adopted. In that case the Court of Appeals for the Second Circuit affirmed a denial of relief to the plaintiff.

It is submitted that the trade-mark "Hyde Park" is certainly no weaker, and probably considerably stronger, than the trade-mark "National", and that the similarity between men's clothing and women's clothing is even greater than the similarity of the products of the parties in this case, especially in view of the fact that clothing is distributed and marketed in the same fashion and is sold to the same general class of customers, which similarity does not exist in the instant case.

In *Arrow Distilleries, Inc. v. Globe Brewing Co.,* 117 F. 2d 347 (C. A. 4th, 1941), the Court of Appeals for the Fourth Circuit permitted the use of the trade-mark "Arrow" on cordials and liqueurs as well as on beer. Here again, the trade-mark is certainly no weaker than the one involved in the present suit, and the products are at least as similar as the products in the instant case.

In *California Fruit Growers Exch. v. Sunkist Baking Co.,* 166 F. 2d 971 (C. A. 7th, 1947), the Court permitted the use of the name "Sunkist" on bakery products and on citrus fruits and canned and dried fruits and vegetables. "Sunkist" is a stronger trade-mark than the word "National", and bakery products are as closely allied to fruits and vegetables as are the products of the respective parties here. Further, the products were sold in grocery stores to the same class of consumers, namely housewives. Although the quotations from the opinion of the trial court in the *Sunkist* case suggest that the trial court decided the case on the basis of the Trade-mark Act of 1905, it is clear that the Court of Appeals decided the case on the basis of the provisions of the Lanham Act.

In *Sunbeam Lighting Co. v. Sunbeam Corporation,* 183 F. 2d 969 (C. A. 9th, 1950), and *Sunbeam Furniture Corporation v. Sunbeam Corporation,* 191 F. 2d 141 (C. A. 9th, 1951), the Court of Appeals for the Ninth Circuit permitted the use of the word "Sunbeam" as a part of the corporate names of two companies who made fluorescent lighting fixtures in the one case and household furniture in the other, and despite the objections of Sunbeam Corporation which used the word as a trade-mark as well as a part of its corporate name in connection with electric household appliances.

In each of the foregoing cases, weak trade-marks were denied protection in fields in which they had not previously been used, and primarily because of the weakness of the marks. In the instant case the courts below have protected an admittedly weak mark in a field in which it has never

been used by the Respondent. Had this case been instituted in the Seventh Circuit where the hand dryer companies are domiciled, the decision in the *Sunkist* case, *supra,* would undoubtedly have been controlling and would have resulted in a decision for the petitioners. This conflict in the decisions among the circuits should be resolved and this Court should issue a writ of certiorari in order to resolve it.

In addition, the entire question of the extent to which a weak trade-mark is entitled to protection under the Lanham Act (July 5, 1946 c. 540; 15 U. S. C. A., Sec. 1051) in so far as related fields are concerned is an important federal question which has not yet been, and should be, passed upon by this Court. In this case the Petitioners and their predecessor adopted the word "National" as part of their corporate titles and as part of their trade-mark without knowledge of the existence of the Respondent or of its trade-mark. They have persisted in the use thereof, despite the objections of the Respondent and despite the institution of this litigation, in the honest belief that they were entitled to do so. In this connection, of course, the decisions referred to previously in the Argument have indicated to the Petitioners that their position in this regard has been correct. In the normal conduct of their business affairs, businessmen should be able to tell, with a greater degree of certainty than is presently possible in view of the state of the authorities, when the adoption and use of a weak trade-mark may involve infringement, if at all, of the rights of those in a related field.

The granting of protection to a trade-mark has been said to create lawful monopolies, *Eastern Wine Corporation v. Winslow-Warren, Ltd.,* 137 F. 2d 955, 957 (C. A. 2nd 1943). Attempts to extend such protection of a weak mark to goods on which the mark has never been used represent an unwarranted extension of the monopoly which other courts have condemned, *California Fruit Growers Exch. v. Sunkist Baking Co., supra.* Because of the public interest in preserving competition in our economic system, this

Court should review the decision below and point out the extent to which such monopolies will be permitted to expand.

The need for clarification by this Court in so far as the effect of the Lanham Act is concerned has been discussed in "Trade-mark Infringement and Confusion of Source: Need for Supreme Court Action", 35 Va. L. R. 214 (1949).

It is submitted that the conflict between the decision of the Court of Appeals for the Third Circuit in this case and the decisions of the other circuits referred to and the necessity for clarification on the question of the extent of protection to be granted to a weak trade-mark in a field in which it has not been used, are reasons justifying a review by this Court on writ of certiorari of the judgments entered by the Court of Appeals for the Third Circuit in these cases.

Respectfully submitted,

DANIEL MUNGALL, JR.,
JAMES E. GALLAGHER, JR.,
Counsel for Petitioners.

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION. No. 15589.

THE NATIONAL DRYING MACHINERY COMPANY

v.

JACK ACKOFF, INDIVIDUALLY AND t/a JACK ACKOFF COMPANY.

Opinion

Sur Pleadings and Proof.

(Filed February 15, 1955.)

Before KIRKPATRICK, *Ch. J.*

The plaintiff is engaged in manufacturing hot air drying machines for industrial use, principally in the textile field. Ackoff, the record defendant, sold electric hand dryers manufactured by National Dryer Manufacturing Corporation and distributed by National Dryer Sales Corporation. He has raised a number of defenses and filed a counterclaim based on the activities of his suppliers, and, so far as the trademark phase of this case is concerned, it will simplify the discussion if these two companies are treated as one and called "the defendant".

The plaintiff has been continuously engaged in business (under the same business name) and has been using its trademark upon its drying machines since at least 1929.

The trademark was registered under the Act of 1905 and was, on March 25, 1952, re-registered under the Act of 1946. As registered, it consists of the word "National" in capital letters printed in an irregular line across an outline map of the United States. The registration, however, disclaims the map and the plaintiff relies entirely upon the word, "National". The defendant and its predecessors have manufactured and sold their hand dryer since 1948 or thereabouts and, since January 1950 the defendant has continuously used the words "National Dryer" as its trademark.

I find it to be the fact that use by the defendant of its trademark has caused confusion and deceived prospective purchasers as to the source or origin of the defendant's machines and that it is likely to continue to do so in the future. This is the basis for liability under the Act of 1946. That Act dropped the limitation contained in the corresponding section of the Act of 1905 to the effect that the defendant must have used the registered mark on merchandise of substantially the same descriptive properties as those set forth in the registration. There is a difference of judicial opinion as to the limits of protection given to a trademark. Even under the narrowest view—the one which accords protection only in cases where there is not only a likelihood of confusion of source but also actual competition is the trademarked articles—a manufacturer will be protected if the product on which his trademark is being used by another is fairly within the normal field of expansion of his business, because it would be natural for purchasers acquainted with the former business and the mark to assume that the new product bearing the same mark was produced by the same manufacturer.

In the present case the defendant's argument is, in effect, that the evidence produced by the plaintiff of actual instances of confusion is so slight as to be negligible and that likelihood of confusion is negatived by the difference in the articles sold by the parties, the methods of merchan-

dising and the class of customers addressed by each through advertising and solicitation. To this the defendant adds the admitted fact that the mark is a weak one, that the defendant has without fraudulent intent built up a considerable goodwill of its own and that the plaintiff's declaration of its intention to engage in the manufacture of hand dryers competing with the defendant's is, at least, suspect. There is no suggestion that there is any real danger of the plaintiff's product being brought into disrepute by the defendant's use of the name and, actually, the case comes down to the question whether the trademark owner will be protected in a field which he has not actually entered, and this in turn depends upon whether the field is one which might be considered in the line of normal expansion of his business.

Many of the facts upon which the defendant relies may be admitted. The plaintiff's business, as of today, is almost exclusively confined to large expensive drying machines which are commonly manufactured according to the individual needs of the purchaser and are intended for use in connection with industrial processes. The defendant manufactures a small, comparatively low-priced item which it markets through distributors for the retail trade, the ultimate customers being, generally, hotels, schools, public institutions and the like, and some industrial plants.

It is an impossible task to draw from the precedents a rule which will fit every case as it arises. I can only say that, from all the evidence, I have reached the conclusion that the manufacture of hot air hand dryers is a field so closely connected with what the plaintiff is doing at the present time that it can be considered an area of normal expansion of the plaintiff's business.

It must be conceded that "National" is almost as weak a mark as can be found. However, it is quite likely that a purchaser would have some difficulty in explaining which product he desired if he should try to identify it by its trade name. He would have to ask for prices on a "National"

dryer as distinguished from a "National Dryer" or vice versa. If a trademark, however weak, is to retain any validity, a manufacturer must be protected against a competitor's placing his customers in such a dilemma.

As to the special defenses raised by the defendant, the evidence falls short of sustaining any of them.

I find that the plaintiff's claim is not barred by laches, that the plaintiff is not estopped in this action by acquiescence in the defendant's use of the mark and that there has not been on the part of the plaintiff such acquiescence in the use of the mark by persons other than the defendant as would amount to abandonment or loss of the right to enforce the mark.

I do not find that the defendant has ever attempted the fraudulent use of the trademark or that it adopted it with any intention of misleading customers or palming off its machines as the plaintiff's, but neither can I find that its use has been innocent. It certainly used the mark after it knew or should have known of the plaintiff's rights. Whether it did so in "good faith" depends upon what meaning one gives that somewhat elusive term. At any rate, it is no defense that it ill-advisedly continued to assert rights to which it may have honestly believed it was entitled but which it did not have.

The present suit was instituted against Jack Ackoff who was selling the alleged infringing goods in this district. In late July or August 1953, he entered into negotiations looking toward his becoming the exclusive agent for the sale of the hand dryers in this territory. However, before binding himself to a fixed quota, he wished to test the product in the market. As a result, he acted as an exclusive agent from August 1953 until February 1954 at which time he concluded that the line could not well be handled by him, and his exclusive agency terminated. He continued thereafter as a retail dealer for a few months and then broke off his relationship with his suppliers entirely. His answer and counterclaim raised certain issues of laches and prior

use by his suppliers, etc., which it is doubtful that he could raise unless he were an exclusive agent. However, though I have found these defenses were without merit and that the counterclaim cannot be sustained, I should add that they are not subject to dismissal because of his inability to avail himself of them.

In spite of the fact that Mr. Ackoff no longer handles the infringing dryer, an injunction will issue against him in view of the distinct possibility that he would again do so. In view of the fact that the plaintiff does not at the present time manufacture any goods which would compete with the goods Mr. Ackoff sold, I cannot award the plaintiff more than nominal damages. However, I do award the plaintiff the costs of this suit, since at the time it was instituted and carried on Mr. Ackoff was engaged in the wrongful activity complained of.

Judgment may be entered for the plaintiff.

The statements of fact and law in the opinion are to be taken as modifying the answers to requests for findings of fact and conclusions of law and, in case of any conflict between the answers and the opinion, the statements in the opinion shall govern.

PLAINTIFF'S REQUESTS FOR FINDINGS OF FACT.

Nos. 1, 2, 5, 14, 16, 17, 21, 22, and 24 are affirmed.

Nos. 4, 6, 8, 9, and 10 are not answered since they are not requests for fact findings.

Nos. 11, 12, and 15 are affirmed except for the first sentence of each.

No. 3. Not answered. It is adequately covered in answers to other requests.

No. 7. Affirmed, striking out the last part of the request beginning "and wilfully and wantonly". This is adequately covered in the opinion.

No. 13. Denied.

No. 18. Affirmed with the qualification that "National" is a part of the trademark of the Sales Company. See opinion.

No. 19. They are substantially the same.

No. 20. Not answered as immaterial.

No. 23. Affirmed, changing the word "or" the first time it appears to "and".

No. 25. Affirmed, but limited to trademarks on drying machinery.

DEFENDANT'S REQUESTS FOR FINDINGS OF FACT.

Nos. A1, A3, A4, A5, B3, B4, B5, B6, C1, C2, C3, D1, D3, D4, F2, F4, F5, F6, and F7 are affirmed.

Nos. D5, E1, E2, E3, E4, and E5 are not answered since they are not requests for fact findings.

No. A2. Affirmed with the qualification that its production is not limited to the assembling of standard parts and it has produced a few clothes dryers. The Court does not wish to adopt the word "commercially", since its meaning is too indefinite.

No. B1. Affirmed, changing the word "Machinery" to "Manufacturing" wherever it appears in the request.

No. B2. The facts stated are correct. The motives are immaterial other than that the persons who chose the names thought them suitable and, except for the Sales Company, there is no evidence to show that they knew of the National Drying Machinery Company.

No. D2. Affirmed as stated.

No. E6. Denied.

No. F1. Affirmed as qualified by the discussion in the opinion.

No. F3. Affirmed, but it must be borne in mind that pressing requires the drying of the material and this press was not intended as a dryer in any other sense.

PLAINTIFF'S REQUESTS FOR CONCLUSIONS OF LAW.

Nos. 1, 2, 3, 5, 9, 10, 13, 14, 17, 20, and 24 are affirmed.

Nos. 4, 7, 8, 12, 19, and 21 are denied.

No. 6. Denied, there is no evidence of unfair competition except trademark infringement.

No. 11. See opinion.

No. 15. Affirmed, striking out the last sentence.

No. 16. Affirmed, changing "any type of dryer" to "these types of dryers".

No. 18. Affirmed, but limited to use of the word as a trademark.

No. 22. Affirmed, striking out "and other types of dryers". This is not intended as a limitation on the scope of the trademark, but the Court can only decide cases presented to it.

No. 23. Not answered, covered in the opinion.

No. 25. Not answered.

DEFENDANT'S REQUESTS FOR CONCLUSIONS OF LAW.

Nos. 1, 2, 5, 6, and 7 are denied.

No. 3. Affirmed.

No. 4. See opinion.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 11,639

NATIONAL DRYER MANUFACTURING CORPORATION AND NATIONAL DRYER SALES CORPORATION,

Appellants,

v.

THE NATIONAL DRYING MACHINERY COMPANY.

No. 11,640

NATIONAL DRYER MANUFACTURING CORPORATION AND NATIONAL DRYER SALES CORPORATION,

Plaintiffs,

v.

THE NATIONAL DRYING MACHINERY CO.,
Defendant-Appellant.

No. 11,641

THE NATIONAL DRYING MACHINERY COMPANY,

v.

JACK ACKOFF, INDIVIDUALLY AND TRADING AS JACK ACKOFF COMPANY,
Appellant.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Argued December 5, 1955

Before McLaughlin, Kalodner and Hastie, *Circuit Judges.*

Opinion of the Court.

(Filed December 22, 1955)

Per Curiam.

These three appeals arise out of two cases which were consolidated for trial. In No. 11,641, National Drying Machinery sued Jack Ackoff, individually and trading as Jack Ackoff Company, as distributor for National Dryer Manufacturing Corporation and National Dryer Sales Corporation. That suit was started on July 23, 1953. It charged Ackoff with unfair competition and trade-mark infringement in the use of the word "National" in connection with the sale of an electric hot air hand dryer. On March 12, 1954, the manufacturing corporation and the sales corporation sued the machinery company seeking a declaratory judgment that they were not violating any rights of the machinery company and an injunction against the latter from using the word "National" in the hand dryer field. The machinery company in its answer and counterclaim asserted its right to the use of the word "National" on drying machines and asked for an injunction against the manufacturing and sales corporations including restraint from using the word "National" as a trade-mark for any type of drying machines.

In both cases Chief Judge Kirkpatrick decided that the machinery company is the sole owner of the trade-mark National as applied to drying machines. Ackoff in No. 11,641 and the manufacturing and sales corporations in No. 11,639 were held to have infringed the statutory and the common law rights of the machinery company. They were all perpetually enjoined from selling or in any way dealing with drying machines under the trade-mark National or any business name which includes the word Na-

tional. In the second suit, originally the decree ordered the manufacturing and sales corporations to pay the machinery company all their profits from the sale of drying machines" [f]rom January 1950 to date." Later the trial court amended the decree by striking that language. It is from this action of the district court that the machinery company appeals in No. 11,640.

From our review of the record we are satisfied that it furnishes strong support for the decision of the district court as to the ownership of the trade-mark National by The National Drying Machinery Company and that Jack Ackoff, individually and trading as Jack Ackoff Company and National Dryer Manufacturing Corporation and National Dryer Sales Corporation infringed the statutory and common law rights of the machinery company.

With respect to the machinery company's claim for profits, the trial court is correct in its finding that there is no proof of any damages suffered by that concern and that the injunctions granted afford it complete relief. Under the equities of these cases the trial court's disallowance of an accounting of profits was proper. Champion Spark Plug Co. v. Sanders, 331 U.S. 125 (1947). Cf. Mishawaka Mfg. Co. v. Kresge Co., 316 U.S. 203 (1942). Century Distilling Co. v. Continental Distilling Co., 205 F.2d 140 (3 Cir. 1953) concerned a far different factual situation. It does not conflict with the above holding.

The denial of the motion on behalf of the machinery company for an allowance of counsel fees was well within the discretion of the trial court.

The decrees in these cases will be affirmed.